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COLOR OF TITLE—WHAT IS IT?

It is well to remember that this enquiry is important only in those jurisdictions where color of title is held to give to the disseisor, who has *actual* possession of only a part of the land he claims, *constructive* possession to the extent of the boundaries contained in his color of title, in the absence of any actual possession by the true owner.

If this effect is not given to color of title, it at once loses its peculiar significance and importance.

It has been sometimes said that "its effect is to fix the character of the occupant's possession." . . . (*Creekmur v. Creekmur*, 75 Va. 438.) We shall see that this is but a question of whether the occupant's possession is with or without claim of title—not what kind of title he claims. It is a wholly different matter whether the title elaimed gives the occupant color of title. Sedg. & Wait on Land Titles, sec. 763 to 765.

It has been sometimes said that "its effect . . . is to define the extent and limits" of the occupant's possession. (*Creekmur v. Creekmur, supra*, p. 438.) If this language be taken to refer to the *constructive* possession above referred to—as was, in truth, no doubt intended—no exception can be taken to it. But the language is too broad for a definition or test of color of title. Literally it refers to an *actual* possession. Every visible act or outward evidence of *actual* possession "defines its extent and limits." Marked boundaries, cultivation, enclosures, &c., &c., would do this—not color of title. Sedg. & Wait on Land Titles, sec. 763 to 765.

And so, we see, that losing sight of the one single effect which renders color of title important—the *constructive* possession it is held in some jurisdictions to give—we find in many cases such expressions, in effect, as the following: "Where a party is in possession under and in pursuance of a certain state of facts which of themseives show the character and extent of the entry and claim, . . . such facts

. . . perform sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title can do more. . . . . ." (*Bell v. Longwood*, 6 Ind. 273.)

This line of cases, it will be seen on examination, leaves out of consideration any *constructive* possession. They treat entirely of an *actual* possession—an actual entry—to the extent of the bounds claimed, and the character of the claim, whether it be *bona fide*, whether there is in fact a hostile claim of title, or no, &c., &c. No constructive possession is given or considered.

In other words, what is spoken of in these cases as color of title, is whatsoever may serve as evidence of the *actual* possession, its extent, and the actual claim of title under which it is taken and held.

It is at once apparent that this is a far different thing from the consideration of what is *the* color of title which is held in some jurisdictions to give constructive possession, as above stated.

Indeed, it is manifest, that the giving of this effect to color of title in some jurisdictions is an arbitrary thing—not founded in any principle.

It seems at war with the principles of the law to give *constructive* possession to a disseisor.

It is, however, *res judicata* in Virginia. It was first so laid down by that distinguished and learned Judge, Baldwin, J., in his able opinion in *Taylor v. Burnsides*, 1 Gratt. 196. It has since been followed in Virginia. It has been approved by the Supreme Court of the United States in the case of *Hunnicutt v. Peyto*, 102 U. S. 333, and in other cases.

In New Jersey, this doctrine of giving to color of title the effect of constructive possession has been rejected. In *Den v. Hunt*, 20 N. J. L. 487, the court says: "It appears to me that we cannot carry out this doctrine of constructive possession without becoming involved in serious difficulties. . . . Whenever a party relies upon an adverse possession for his right to land he impliedly admits that the strict legal right is in another; and that this legal right has been invaded more than twenty years before action brought. And this idea of wrong is associated with every adverse possession in the first place, whether under color of deed or not. For it is a settled principle of the law, that two persons cannot be severally seised in fee at the same time of the same piece of land. If the title of one is good, that of the other is bad. Now if the one claiming under a defective paper title, how-

ever honest he may be, takes possession of a part of the land claiming it as his own, he does a wrong to him who has the legal title. It is an invasion of his right of possession. Is it right that this wrongful possession should be extended by construction to the metes and bounds of the defective paper title, to the prejudice of him who has the legal title? I think not. There should be other evidence than a mere residence on or enclosure or cultivation of a small part. . . ."

This view of the subject is ably discussed in the foot-notes to 26 Am. & Eng. Encyc. Law, pp. 39 to 43. On page 46 of same, the annotator refers to an article by Mr. H. Campbell Black on color of title, which appeared in the *American Law Register*, July 1887. The latter article is a very able and learned one, reviewing a great number of authorities. The conclusion arrived at by Mr. Black is that no writing is necessary to constitute color of title. The cases upon which this conclusion rests, however, are of the same class as that of *Bell v. Longwood*, *supra*. They leave out of view the giving of constructive possession to color of title. But to return to this question.

If it were an open question in Virginia, it might well be contended that no such effect as constructive possession should be given to color of title.

But however this may be, it is at once apparent that in all jurisdictions where the New Jersey view obtains, and in all the cases where, from whatever cause, the courts are considering actual possession of the whole of the land claimed, and not what will give constructive possession to the disseisor, how many and how great variety of things may be called color of title, which might not be so called were these courts defining something which would give constructive possession? That is to say, in the point of view of these cases, what is called *color* of title is in truth a mere *claim* of title; and it at once follows, that it may be without any written instrument, by parol, by descent, or by any other state of facts, accompanied by acts of possession, over the whole of the land claimed, which evidence with sufficient notoriety the extent and character of the entry and claim.

That is to say, these courts and cases, where constructive possession is not treated as an incident to color of title, in effect hold, that a disseisor can never have constructive possession beyond his actual *pedis positio*, even though he claim under a written instrument. That is, a disseisor with color of title (in the sense in which the term is first above used), and one without color of title, stand on the same footing. Hence the terms *color of title* and *claim of title* may be and are used indiscriminately and interchangeably one for the other.

It would seem, therefore, that the foregoing will account for the expressions let fall by Staples, J., in *Creekmur v. Creekmur*, *supra*: "It is impossible to say with any degree of accuracy what is color of title. Upon this subject there is hopeless confusion as well as irreconcilable diversity of opinion. Color of title has sometimes been held to be that which is in appearance title, without being in reality so. Again, it has been held that it matters not . . . whether the occupant makes color under a written or parol contract or no contract at all. . . ."

With his usual ability and force, Judge Staples has here succinctly stated the two views which have been taken by the courts of different jurisdictions of what is color of title. It was not necessary in the case of *Creekmur v. Creekmur* to decide what was color of title—no constructive possession was to be given. Hence the distinction was not there brought out, that the first view expressed by Judge Staples is held in jurisdictions where constructive possession is given to color of title, and the second view expressed by him is held where no constructive possession is given. This distinction, it is believed, reconciles the various decisions and dissipates the apparent confusion amongst the authorities.

The question, then, reduces itself to this: What is that color of title which the courts in certain jurisdictions have held will give constructive possession to the disseisor?

We have simply to look to the decisions of the courts that have given *this* effect to color of title, and the considerations actuating them, to answer this question.

No enquiry, entirely upon principle, as to what ought to give constructive possession to a disseisor will lead to any satisfactory conclusion. Because, as above submitted, no such possession can be justified on principle.

It is a case of Judge-made law pure and simple, howbeit it may be of long standing.

We may suppose that this idea of giving constructive possession to the disseisor with color of title had its origin in the high regard in which the common law held vested rights and titles; which, indeed, in time imparted an idea of dignity, and even of sanctity, and of virtue, to the mere forms by which these rights and titles were vested, insomuch that it was considered that one who had the form of title, though the form and appearance only, was yet entitled to some of the benefits which belong to the holder of the real title. It was thought, perhaps, that such an one should stand on a higher footing than a

mere claimant without any pretense of title. And so it was held that the latter should be confined to his *pedis positio*, but the former should have constructive possession to the extent of the bounds contained in his color of title, if he but took actual possession of a part of the land, and the true owner had no actual possession of any part thereof.

And so we see that Mr. Minor, in his 2 Inst. (3d ed.), 576, citing 1 Lom. Dig. 797; *Taylor v. Horde* (1 Burr, 60); and 2 Smith's L. C. 324, 396, says that the "*law* holds" that the disseisor shall have this constructive possession, who "enters under color of title by deed or other writing."

This, however, is very broad. What "other writing" will suffice? A plat is a writing. Any written memorandum is a writing, though it does not convey, purport or contract to convey, title. Will they give color of title?

We look to the Virginia decisions, and until the recent case of *Sulphur Mines Co. v. Thompson*, we do not find any case in the affirmative, in point, on this question. It is also true, however, that, in the negative, we find that the court has never given the effect of constructive possession except to a claim under a deed or other writing purporting to pass title to certain boundaries fixed in legal contemplation by the deed or writing.

The case of *Sulphur Mines Co. v. Thompson* (reported in this number of the REGISTER) is more definite, and holds, that "Color of title necessarily implies that the party relying upon it must claim under something that has the semblance of title. A private survey and map, never recorded, nor referred to or made a part of the deed under which the party relying on it claimed, cannot be considered color of title."

We may, therefore, say that, in Virginia, color of title must be something that "has the semblance of title"—*i. e.*, purport to pass title—be something that would have passed title had it proved to be what it was in appearance.

Here we come to the end of express authority in Virginia.

Let us see what is the exact position in which the latter case leaves the question in Virginia.

It does not define color of title, but it does confine it to a well-known and fixed class of things. It sets bounds to the question, outside of which we have no longer to look for color of title. This goes a long way. Now what is the class of things within and amongst which we can alone find color of title?

The answer is: Things which have the "semblance of title," and those only.

Now, there are six modes known to the law by which title can be acquired or transmitted: 1. Escheat. 2. Forfeiture. 3. Occupation. 4. Statute of limitations. 5. Descent. 6. Alienation, which must be by deed or will or by contract in writing which, under the statute, is equivalent to a deed. Therefore, we must find something which has the semblance of some of these six things in order to have the color of title we have under consideration. Anything which has not the appearance of any of these six things can at once be pronounced *not* to be color of title. But,

Can anything that has the appearance of *any* of these six modes of acquiring or transmitting title be pronounced *to be* color of title?

It would seem that the semblance of none of the following things in said class can serve as color of title: Not escheat, because it does not transmit title except to the Commonwealth. Not forfeiture—where it transmits title to the Commonwealth—for the reason just stated, nor where it transmits title to an individual, because the latter enters, sometimes as of his original title, and at others by warrant of law merely, which in its nature does not fix the boundaries to which constructive possession is to be given. Not occupancy, for here also there is nothing to fix the boundaries to which constructive possession is to be given, it is a matter of actual and not of constructive possession. Not the statute of limitations, for the like reasons next above given.

It will be observed that these latter positions are based upon the supposition that the courts have required the boundaries to which constructive possession is to be given to be fixed by that thing to which they give the effect of constructive possession.

When we have regard to the reasons, above suggested, which are supposed to have actuated the courts in giving the effect of constructive possession to color of title, it would seem to be expected that they would require the boundaries to which constructive possession is to be given by virtue of the color of title to be fixed thereby. This conclusion is supported by authority. Sedg. & Wait on Land Titles, sec. 767, and cases cited. This being so, it follows that color of title must fall under the head of the sixth item of said class—Alienation. It must be by writing. Sedg. & Wait on Land Titles, sec. 769.

It seems, therefore, upon the whole, that a correct definition of color of title, to which the effect of constructive possession will be given, may be found in one somewhat restricting the definitions given by Mr.

Minor, *supra*, and Sedg. & Wait on Land Titles, sec. 769, *supra*. And the following, with diffidence, is submitted to the profession:

Color of title, under which constructive possession will be given, must be by deed or other writing, which purports or contracts to pass title, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained by the application of the general rules governing the location of land conveyed by any deed.

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THE CONTRACT RELATION BETWEEN ASSIGNOR AND ASSIGNEE OF NON-NEGOTIABLE CHOSES IN ACTION, AND THE RIGHTS ARISING THEREFROM.

The assignability of certain choses in action is now well settled in Virginia, as is also the distinction between rights in action assignable and those not assignable. The rights of the assignee against the debtor are clearly fixed and defined. He acquires all rights of property in the chose in action, and is entitled to all remedies for its enforcement which his assignor had, but no other or greater. The debtor has, substituted without his consent, a new party to whom he is due the performance of his contract. These questions, and all questions affecting the assignee and the debtor, are fully discussed in the books. But the contract relation between assignor and assignee, and the rights and duties growing thereout, are very meagerly discussed, and this is my apology for offering this article.

Two opposite views of this relation were urged upon the court by the opposing counsel in the case of *Mackie's Ex'or v. Davis and Others*, 2 Wash. 219. This was an action of *assumpsit* brought by the assignees of a bond against the executor of the assignor to recover upon the assignment, the assignee having failed to collect the bond from the debtor. No special undertaking on the part of the assignor to be liable to the assignee in case of his failure to collect was shown, and the jury found a verdict for the plaintiffs, subject to the judgment of the court. Judgment was rendered upon this verdict for the plaintiffs, and the defendant appealed.

In the Court of Appeals it was contended on the part of the appel-